In The

Supreme Court of the United States

October Term, 1976

No. 76-250

FATHER FLANAGAN'S BOYS' HOME,

Petitioner,

vs.

MILLARD SCHOOL DISTRICT, SCHOOL DISTRICT NO. 17 OF DOUGLAS COUNTY, NEBRASKA; ROBERT BARTELS; LOWELL BOETGER; HOUGHSTON TETRICK; ROBERT ACKERMAN; DONNA BLACK; CHARLES HASKINS; JAMES H. MOYLAN; WILLIAM L. OTIS; and JOSEPH KIRSHENBAUM,

Respondents.

RESISTANCE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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The Respondents respectfully resist the Petitioner's Petition for Writ of Certiorari to the Supreme Court of the United States for the reason that the Petitioner has failed to allege or establish grounds in its Petition and Brief to warrant a review by Writ of Certiorari in that there are no constitutional or other federal questions involved and the issues have been duly adjudicated by the Supreme Court of Nebraska.

QUESTIONS PRESENTED

The questions raised are:

1. Whether certiorari should be granted where the Supreme Court of Nebraska has found as fact that the taking of the 40 acres of farmland will not substantially interfere in any way with the Petitioner's school programs.

2. Where the State Courts have found that the condemning authority has a need for the property, is there any constitutional prohibition to taking for public use property owned by a private school under the legislative power of eminent domain.

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STATEMENT OF THE CASE

The issue is whether there is a constitutional prohibition to the taking by a school district for a public school site under the legislative power of eminent domain of 40 acres of farmland, owned by a private school and farmed by seven (7) of the school's employees for commercial purposes.

Pursuant to the appropriate statutes, the Respondents instituted condemnation proceedings. The proceedings thereafter were enjoined by the District Court of Douglas County, Nebraska.

On appeal by the Respondents to the Supreme Court of Nebraska, the judgment of the District Court was reversed and the cause remanded with directions to vacate the injunction and dismiss the action.

On June 18, 1976, the Petitioner filed a Motion for Rehearing and Application for Stay of Mandate with the Supreme Court of Nebraska, both of which were denied on July 23, 1976. The Mandate to the District Court was issued on July 23, 1976.

The Petitioner filed an Application for Stay of Mandate Pending Review on Certiorari, addressed to Mr. Justice Blackmun, on July 29, 1976, which was denied on August 2, 1976.

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STATEMENT OF FACTS

Under Section 25-1925 R. R. S., 1943, on appeal of an equity case from the District Courts to the Supreme Court of Nebraska, the Supreme Court retries the issues and evaluates the facts upon the record at trial for the purpose of reaching an independent conclusion as to the facts and the issues.

The District Court had found that the Respondent has a need for a high school in the area and had a substantial interest in and need for the property in question.

Upon the record, the Supreme Court found that the Petitioner owns and operates 950 to 1,000 acres of agricultural property and employs seven (7) persons full-time for this purpose; that many of the boys do farm work voluntarily or for disciplinary reasons; that the milk from the dairy operation and the surplus crops not used in the dairy operation are sold on the commercial market; that there are no buildings located on the 40-acre tract which

has always been used for row crops; that there is nothing unique about the 40-acre site; and that the loss of the 40 acres will not substantially in any way interfere with the Petitioner's school programs. *Father Flanagan's Boys' Home v. Millard School District, et al.,* 196 Neb. 299, 242 N. W. 2d 637 at pages 639 and 640 (1976).

The Supreme Court of Nebraska further held that the discretion of the condemning authority includes the discretion to determine the necessity and extent of exercising the power of eminent domain and the location of the site to be taken; that property used for educational purposes is subject to condemnation for public use; and that the Colorado law pertaining to reasonable alternate means was not applicable to the facts in the case. *Father Flanagan's Boys' Home v. Millard School District, et al.,* 196 Neb. 299, 242 N. W. 2d 637 at page 640 (1976).

ARGUMENT

I.

A review of Writ of Certiorari will not be granted where there is no showing that the Supreme Court of Nebraska decided a federal question of substance not previously decided by the Court or decided a federal question in a way probably not in accord with applicable decisions of the Court.

The Supreme Court of Nebraska, after a review of the record de novo, found that there was nothing unique

in the 40-acre tract of farmland owned by the Petitioner; that the loss of the property would not interfere substantially in any way with the operation of the Petitioner's school programs; that the Petitioner would still have more than 900 acres of agricultural land; and that there is nothing in the record to suggest that the remaining land would not be adequate for school purposes.

The findings of fact of the Supreme Court of Nebraska do not present any constitutional questions.

None of the findings of fact fall within the purview of Rule 19 of the Revised Rules of the Supreme Court of the United States, 28 U. S. C. A. Rule 19 embodies the criteria by which the Court determines whether a particular case merits consideration, particularly with regard to the limited reviewing power to which the Supreme Court is confined. *Rice v. Sioux City Memorial Park Cemetery,* 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

Each of the Questions Presented, as set forth in the Petition for Writ of Certiorari, is answered by the factual determination of the Supreme Court of Nebraska. The Court did not decide any federal questions of law not heretofore determined by the Supreme Court of the United States nor was its decision in any way probably not in accord with applicable decisions of this Court.

Where the highest court of a state has made findings of fact and decided issues in accordance with the state law, great weight and highest respect should be accorded such findings of fact and applications of state law. *O'Neill v. Leamer,* 329 U. S. 244, 36 S. Ct. 54 (1915); *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U. S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950); *Mayor of the City of Philadelphia*

v. Educational Equality League, 415 U. S. 605, 94 S. Ct. 1323, 39 L. Ed. 2d 630 (1974). The Supreme Court of the United States does not reexamine local law as applied by the local courts. *Skelly Oil Co. v. Phillips Petroleum Co.,* supra.

The Supreme Court of Nebraska held that the power of eminent domain is a legislative matter, not subject to judicial review or supervision, and that the power of eminent domain includes the discretion to determine the necessity of exercising the power and the location of the site to be taken and cited in support of its decision. *Hammer v. Department of Roads,* 175 Neb. 178, 120 N. W. 2d 909 (1965) and *May v. City of Kearney,* 145 Neb. 475, 17 N. W. 2d 448 (1945). The decision is in accord with the previous holdings not only of the Supreme Court of Nebraska but also of the Supreme Court of the United States with specific reference to the law on eminent domain, as shown in *Bragg v. Weaver,* 251 U. S. 75, 40 S. Ct. 245, 62 L. Ed. 688 (1918).

II.

Condemnation of property owned by a private school does not contravene any constitutional rights.

Neither the Fourteenth Amendment nor the Federal Constitution in any manner denies to the State the right of eminent domain. *O'Neill v. Leamer,* supra.

The constitutional limitations on the exercise of the power of eminent domain are that the use for which the property is taken must be public, that compensation must be made for property taken, and that due process of law

must be afforded to all parties. *May v. City of Kearney,* supra; *Tyson v. Washington County,* 78 Neb. 211, 110 N. W. 2d 634 (1907); *Burger v. City of Beatrice,* 181 Neb. 213, 148 N. W. 2d 784 (1967).

The Petitioner has never contended, either by question or argument, that the acts of the Respondents violate any of the above-stated constitutional limitations on the exercise of the power of eminent domain.

Under Section 79-4,107, R. S., 1943, the State legislature granted to school districts the right to exercise the power of eminent domain for the purpose of acquiring property for use as school sites. The Court will not review the discretion of the condemning authority in the exercise of eminent domain. *O'Neill v. Leamer,* supra; *Sears v. Akron,* supra; *Bragg v. Weaver,* supra.

In its decision, the Supreme Court of Nebraska held that, as a general rule, property used for religious purposes or for private school purposes is subject to condemnation for public use and cited in support thereof 26 Am. Jur. 2d, Eminent Domain, Section 78, p. 736 and 29A C. J. S., Eminent Domain, Section 65, p. 311. *Father Flanagan's Boys' Home v. Millard School District, et al.,* 196 Neb. 299, 242 N. W. 2d 637 at page 640 (1976).

Further, as stated by the District Court, the Respondent has a substantial need for and interest in the property in question. The Supreme Court of Nebraska found that the loss of the 40-acre site by eminent domain will not substantially in any manner interfere with the Petitioner's school programs.

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CONCLUSION

The Respondents respectfully submit that the Supreme Court should not grant a review of the present matter by Writ of Certiorari for the reasons that the Petitioner has failed to establish grounds for review either under the facts or the law on eminent domain, as adjudicated by the Supreme Court of Nebraska and by previous decisions of this Court. Under the facts as found by the Supreme Court of Nebraska, a taking by eminent domain of 40 of the 1,000 acres of farmland did not effectuate a substitution of public over private education.

Respectfully submitted,

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